

## Where There's Smoke It's Still OK To Fire: Three Things Employers Need To Know About Pennsylvania's New Medical Marijuana Law

*Legal Alert*

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Employers in Pennsylvania will soon begin feeling the effects of Pennsylvania's new Medical Marijuana Act (MMA), which rolls out on May 17<sup>th</sup> and provides new rights for employees who become certified medical marijuana patients. As Pennsylvania joins more than 20 states that already allow medicinal marijuana, including neighbors New York, New Jersey and Delaware, employers should be reviewing their policies and procedures to make sure they are hip to the new law.

First, employers will be relieved to know the MMA, which does not extend to smokable forms of the drug, contains no requirement that employers accommodate the use of medical marijuana during working hours or in the workplace. Specifically, the MMA provides, "the Act shall in no way limit an employer's ability to discipline an employee for being under the influence of medical marijuana in the workplace or for working while under the influence of medical marijuana when the employee's conduct falls below the standard of care normally accepted for that position." The MMA also recognizes the concerns employers may face if their workers are performing safety-related tasks and expressly prohibits certified users from performing certain sensitive jobs while "under the influence" of medicinal marijuana (defined as 10 nanograms of active tetrahydrocannabinol per milliliter of blood in serum for the purposes of certain safety-related activities), including: (1) operating or being in physical control of chemicals which require a permit issued by the federal government, state government, federal agency or state agency; (2) operating or being in control of high-voltage electricity or any other public utility; (3) performing any employment duties at heights or in confined spaces, including, but not limited to, mining; (4) performing tasks that the employer deems life-threatening to either the employee or any employees of the employer; and (5) performing any duty that could result in a public health or safety risk.

The more complicated issue the MMA presents but does not directly address is how the 10 nanograms of active tetrahydrocannabinol per milliliter of blood standard for certain safety-related tasks applies to other working conditions, especially when employees test for lower concentrations but still appear impaired. This should not present a novel problem for employers who have long been disciplining employees who are impaired from taking prescription medicines at work. As in those instances, employers will have to resort to more traditional methods of identifying whether an employee reasonably appears to be under the influence of marijuana while working and make disciplinary decisions accordingly.

Second, employers should know the MMA prohibits employers from discriminating against employees or candidates on the basis that they are certified to use medical marijuana. This means Pennsylvania employers may be liable if they take adverse employment actions against employees who are certified to use medical marijuana, essentially requiring employers to treat medical marijuana in a manner consistent with the way employers treat more traditional medical interventions. Where, however, the use of medical marijuana

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conflicts with federal law, the MMA does not require employers to “commit an act that would put the employer or any person acting on its behalf in violation of Federal law.” MMA §2103(b)(3). For example, an employer would not be required to accommodate medicinal marijuana use if such accommodation violates federal Department of Transportation regulations.

Third, the MMA does not require employers to alter their current drug screening policies. A positive test for the presence of marijuana can still justify discipline if the employee does not have a valid prescription and/or if the employee’s use conflicts with an applicable federal law. With that said, employers should reassess whether they want to continue to screen job candidates for marijuana in light of the MMA, as, among other things, (1) the law bars blanket rejections of certified medical marijuana users and (2) an employee’s positive medical marijuana test will often lead an employer to discover a disability about which it was otherwise unaware, creating a potential avenue of liability. Of course, drug testing for marijuana relating to accidents and impairment on duty will continue to be important.

Finally, employers should understand that it will take months and years to fully determine how the MMA will impact the workplace, including whether the “under the influence” standard will be more narrowly applied and the extent to which certifications from other states will give rise to employee rights in Pennsylvania. The Pennsylvania Department of Health (“DOH”) is required to promulgate full regulations within 18 months, and, in the more immediate term, the DOH will publish temporary regulations no later than November 17, 2016. So employers should expect the hits to keep coming as further guidance, rules and interpretations help clear the smoke surrounding the MMA.

To learn more about the information presented in this alert, we invite you to contact Adam Gersh, or any member of Flaster Greenberg’s Labor and Employment Practice Group.